Sep 1 2006

No. 06-124

In The
Supreme Court of the United States

ALASKA RIGHT TO LIFE COMMITTEE, *Petitioner,*
v.
BROOKE MILES, ANDREA JACOBSON, LARRY WOOD, MARK HANDLEY, JOHN DAPCEVICH, and SHEILA GALLAGHER, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply to Brief in Opposition

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Corporate Disclosure Statement

Alaska Right to Life Committee has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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Argument

As set out in the Petition, the Court should grant certiorari because (1) this case involves a matter of great public importance, (2) Alaska's "electioneering communication" definition conflicts with the decisions of this Court and other circuits due to overbreadth, (3) the definition conflicts with decisions of this Court and other circuits due to vagueness, and (4) Alaska's PAC-style regulation of *MCFL*-corporations lacking the major purpose of nominating or electing candidates conflicts with decisions of this Court and other circuits.

Respondents ("APOC") attempt in their Opposition to evade these reasons for granting certiorari by rewriting First Amendment jurisprudence in general and *McConnell v. FEC*, 540 U.S. 93 (2003), in particular. But as shown herein (I) conflicts remain, (II) this case is of vital importance to First Amendment liberties, and (III) this case was wrongly decided below.[1]

I. The Decision Below Conflicts with Decisions of this Court and Circuit Courts.

This Court has consistently required strict scrutiny of restrictions infringing on core First Amendment liberties because of the necessity of protecting this nation's "'profound

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[1]In broad perspective, this case presents an underlying analytical question of great public importance, i.e., whether *McConnell* eliminated First Amendment protection for issue advocacy, and two important specific questions: (a) how far may states expand the definition of "electioneering communication" beyond what this Court approved in *McConnell* and (b) how far may states expand the restrictions placed on *MCFL*-corporations who make electioneering communications? States may overreach even under the intermediate scrutiny afforded contribution limits. This Court has recently rejected overreaching efforts by a state. *See Randall v. Sorrell*, 126 S. Ct. 2479 (2006) (holding that Vermont's expenditure and contribution limits violated the First Amendment under the holding of *Buckley v. Valeo*, 424 U.S. 1 (1976)).

national commitment to the principle that debate on public *issues* should be uninhibited, robust, and wide-open'" *Buckley*, 424 U.S. at 14 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)) (emphasis added). This protection of issue advocacy is inherent in the First Amendment, which protects against governmental infringements of free expression unless the government can meet the strict-scrutiny burden of justifying a restriction. The Petition set out numerous decisions recognizing the constitutional protection of issue advocacy.

APOC argues that this Court's statement in *McConnell* that the express advocacy line was not constitutionally required absent vagueness or overbreadth, 540 U.S. at 192-93, eliminates constitutional protection for issue advocacy. Opposition 11-15. As APOC would have it, this eliminates any conflict between all the decisions that recognize protection for issue advocacy and the failure of Alaska's law and the Ninth Circuit to adequately protect issue advocacy.

But that is not what *McConnell* did. In *McConnell*, this Court was confronted with a statute that prohibited[2] corporations from making electioneering communications from general treasury funds, requiring them do so through a PAC instead. In

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[2]In the case at bar case we deal with both disclosure (of an overly burdensome sort) and a *prohibition*. APOC argues that Alaska's restrictions "only require *disclosure* of electioneering activities and do not *prohibit* any speech." Opposition 17 (emphasis in original). But unless an *MCFL*-corporation submits to unconstitutional PAC-style burdens, it is *prohibited* from making electioneering communications. So unless AKRTL submits an application and is approved to pre-register as a "nongroup entity" (an *MCFL*-corporation) it is prohibited from making any electioneering communications. If it gains APOC's approval, it may make electioneering communications subject to periodic reporting, from which it may escape only by ceasing to exist. Petition 4-6. Alaska's restrictions prohibit *MCFL*-corporations from making "electioneering communications" by imposing on them the very sort of PAC-style restrictions from which *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262-64 (1986) ("*MCFL*"), and *McConnell*, 540 U.S. at 211, said they were exempt.

response to the *McConnell* plaintiffs' argument "that the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications," 540 U.S. at 205-06, this Court responded that "[t]his argument *fails to the extent that* the issue ads broadcast during the 30- and 60-day periods preceding federal primary and general elections are the *functional equivalent of express advocacy*." *Id.* at 206 (emphasis added).

So after *McConnell* only two tightly-defined restrictions on issue advocacy had survived strict scrutiny: (1) express advocacy and (2) its facially-proven functional equivalent, i.e., federally-defined electioneering communications. Any restrictions beyond these two remains in the realm of protected issue advocacy. This is so because the First Amendment *automatically* protects issue advocacy unless the state sustains its strict-scrutiny burden of justifying a restriction. So all the decisions of this Court and other federal courts striking down (or narrowly construing) restrictions on issue advocacy beyond the realm of express advocacy remain valid law except with the added gloss that one functional equivalent to express advocacy has now been recognized. To hold that there is no protection of issue advocacy outside these two narrowly-defined areas would be to hold that the First Amendment has been repealed.

There is a second conflict. To implement the First Amendment's protection of issue advocacy, this Court and numerous other federal courts have required a *full* strict scrutiny analysis. Here again, there is a conflict between the holdings of this Court and other federal courts and the decision below. APOC and the Ninth Circuit consider *McConnell* a license to impose restrictions on First Amendment liberties, especially if the restrictions are styled as mere "disclosure."[3] Under this view, it is enough to (a) point to some recognized compelling interests

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[3]Alaska goes beyond mere disclosure. *Supra* at n. 2

justifying disclosure in general and then (b) ignore narrow tailoring in favor of a rough-similitude test that says that these restriction are something like restrictions already approved, all the while ignoring the crucial distinctions between the actual definitions that are the essence of narrow-tailoring analysis. For this reason alone, this Court should accept this case for review and reaffirm strict scrutiny in this crucial area of the people's liberty.

This truncated view of strict scrutiny is evident in APOC's argument that the Ninth Circuit really *did* use strict scrutiny because it *talked* about "strict scrutiny" and "compelling state interests." Opposition 12. But the failure of APOC and the lower court to mention (or employ) *narrow tailoring* is evident in the following excerpt from the Opposition, quoting the Ninth Circuit:

> The [Ninth Circuit] "assume[d] without deciding that strict scrutiny applies to all of the challenged disclosure requirements, and that Alaska must advance a '*compelling interest*' to justify them.' . . . Applying strict scrutiny the [Ninth Circuit] found that [sic] the registration, reporting, and disclosure requirements to be "not significantly burdensome" and "not particularly onerous." . . . It found that these minimal burdens were justified by *compelling state interests*. . . . "[W]e hold that these interests are justified by *compelling state interests*."

Opposition 12 (quoting Ninth Circuit opinion; citation omitted) (emphasis added). Conspicuously absent is any mention of narrow tailoring.

The "exacting scrutiny applicable to limitations on core First Amendment rights of political expression," *Buckley*, 424 U.S. at 44-45, includes both the finding of a compelling interest and a close examination of whether a particular restriction is necessary to advance that interest, is narrowly tailored to avoid

reaching too broadly, and is the least restrictive means of advancing the compelling interest—all with the proof burden on the State. So it was not enough for APOC and the Ninth Circuit to simply point to the existence of compelling interests justifying "disclosure" and say that Alaska's restrictions don't seem very burdensome to them. Narrow tailoring does not tolerate the rough-similitude analysis that the Ninth Circuit and APOC substituted for strict scrutiny by pointing to the federal model as providing the pattern but providing no evidence or analysis justifying the leap from restricting broadcast ads to restricting all public communications and directly targeting public issue discussion.[4]

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[4]Strict scrutiny mandates narrow-tailoring analysis:

> Under the strict-scrutiny test, [the State has] the burden to prove that the [restriction] is (1) narrowly tailored, to serve (2) a compelling state interest. *E.g., Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989). In order to show that a given statute is narrowly tailored, the State must demonstrate that it does not "unnecessarily circumscrib[e] protected expression."

Republican Party of Minnesota v. White, 536 U.S. 765, 775 (2002) (quoting *Brown v. Hartlage*, 456 U.S. 45, 54 (1982)). Where First Amendment rights are involved, the government "must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotation marks and citation omitted); *see also Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 n. 22 (1984) ("[This Court] may not simply assume that the ordinance will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity."). *See also Ashcroft v. ACLU*, 542 U.S. 656, 659 (2004); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 817 (2000); *Board of Trustees v. Fox*, 492 U.S. 469, 480 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978); *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) ("Infringements on [the right to associate for expressive purposes] may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of

As discussed in Part III, APOC's arguments and the decision below do not establish that either (a) Alaska's expanded electioneering communication definition or (b) its imposition of the same restrictions on *MCFL*-corporations that it imposes on PACs is permissible under strict scrutiny's narrow-tailoring analysis.

Another key conflict is the Ninth Circuit's upholding of PAC-style burdens on *MCFL*-corporations that lack the major purpose of nominating or electing candidates. Petition 23-26. APOC's only defense is that there is no conflict because Alaska really does have a major purpose test, but as explained below, *infra* at 9, it is not the *required* major purpose test.[5]

II. This Case Presents Important Questions of Law on Matters of Great Public Importance.

In addition, certiorari should be granted because this is a case of great public importance and raises important questions of law. APOC paints the decision below as being a simple application of *McConnell*. It is not.

Alaska is targeting and restricting issue advocacy beyond the two narrowly-defined restrictions recognized in *McConnell*, i.e., express advocacy and its proven functional equivalent in

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associational freedoms.").

[5]As set out in the Petition, the decision below also conflicts with decisions of this Court and federal circuit courts because such vague phrases as Alaska employs have been construed to require the express advocacy test or have been struck down. Petition 20-23. APOC simply recites the Ninth Circuit's holding that the challenged provisions were not vague, Opposition 8-11, which addresses whether the Ninth Circuit wrongly decided the vagueness challenges (to be briefed on the merits), not whether similar phrases have been construed or struck as void for vagueness.

In addition, the Ninth Circuit's approval of Alaska's imposition of PAC-style burdens on groups without the major purpose of nominating or electing candidates presents a clear conflict with the decisions of this Court and federal circuit courts holding that PAC status may not be imposed absent such a major purpose. Petition 23-26.

the form of federally-defined electioneering communications. Alaska has expanded its electioneering communication definition to include all public communication media (not just broadcasting), and it has added a vaguely-defined content element specifically targeting public issue advocacy on important matters of public debate. Other states are enacting similar statutes. Petition 14 n.14.

Alaska is imposing PAC-style burdens on *MCFL*-corporations that lack the major purpose of nominating or electing candidates and that were specifically exempted from being (or having) PACs in order to do electioneering communications. *McConnell*, 540 U.S. at 211.

The Ninth Circuit viewed *McConnell* as carte blanche for states to ignore the Constitutional protection of issue advocacy, ignore the second prong of strict scrutiny, and ignore the major purpose test. The states and the people require the protection of this Court for their liberties of expression and association and the correction of the Ninth Circuit lest its error spread.

III. The Decision Below Was Wrongly Decided.

APOC argued, as noted above, that the Ninth Circuit really *did* do strict scrutiny analysis because the Court *talked* about strict scrutiny and compelling interests. But the Ninth Circuit did not talk about narrow tailoring. Rather, it stated its view that the restrictions were neither "burdensome" nor "onerous." *See supra* at 4. But narrow tailoring is not about how "burdensome" or "onerous" a restriction is. Rather, it is about whether there is a close nexus between the compelling interest and the restriction and whether there are less-restrictive means to achieve the compelling interest.[6]

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[6]In two decisions, this Court has described narrow tailoring as requiring a "nexus" between the compelling interest and the restriction. *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988) ("nexus" must be more than "tenuous"); *Virginia v. Black*, 538 U.S. 343, 365-67 (2003) (where an action may indicate both permissible and impermissible intent, a

The question of the degree of burden on First Amendment interests (which the Ninth Circuit addresses here) and whether it rises to a significantly cognizable level to require strict scrutiny was already answered in *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652 (1990), which held that where PAC-style burdens are imposed, there is a sufficient burden on First Amendment rights so that the state must bear the strict-scrutiny burden of justifying the restriction. *Id.* at 256.

What is glaringly absent from the record and the arguments of APOC and the Ninth Circuit is any evidence that there is a particular problem with nonbroadcast communications (meeting Alaska's electioneering communication definition) before elections that would make them the "functional equivalent of express advocacy." *McConnell*, 540 U.S. at 206. There were none of the studies of the sort put in evidence in the *McConnell* case, which all related to broadcast ads. *See* 540 U.S. at 207 ("torrent of televised . . . ads"). While a legislative body need not conduct new studies or produce independent evidence from other legislative bodies, but may rely on what others have done, *Missouri Rep. Pty. v. Lamb*, 270 F.3d 567, 570 (8th Cir. 2001) (quoting *City of Renton v. Playtime Theatres*, 475 U.S. 41, 51-52 (1986)), because Alaska went beyond what anyone else has justified in its electioneering communications definition, it was required to bear the burden of justifying its dramatic expansion. It did not. And the Ninth Circuit did not require of Alaska the "precision of regulation" mandated in strict scrutiny.[7]

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presumption that tips the scales one way or the other is invalid in the First Amendment area). The Ninth Circuit has also recognized the need for a proper "fit" when doing strict scrutiny analysis. *ACLU of Nevada v. Heller*, 378 F.3d 979 (9th Cir. 2004). APOC has attempted no proof of a "nexus" or "fit" between any compelling interest and restricting all public communications that mention candidates and discuss public issues during prohibition periods.

[7]This Court has recently reiterated that narrow tailoring excludes prophylaxis:

APOC also did not meet its burden of proving constitutional justification for imposing on *MCFL*-corporations, which lack the major purpose of nominating or electing candidates, the same pre-registration, periodic-reporting, destructive-termination restrictions that it places on PACs. APOC instead relied on the Ninth Circuit's statement that Alaska's burdens were neither "burdensome" nor "onerous." *See supra* at 4. This is not narrow-tailoring analysis as already noted, and so fails strict scrutiny.

APOC actually asserts that Alaska has a "'major purpose' element," but simply reciting APOC's own words reveals that this "element" is not *the* major purpose test that establishes whether a group may properly be treated as a PAC:

> Alaska's definition of "nongroup entity" *does* include a "major purpose" element, one that focuses on the action the nongroup entity takes, such as making electioneering communications, rather than on the more amorphous purpose of the organization, which seems the focus of the test asserted by AKRTL.

Opposition 17; *see also* 17 n. 10 (definition). APOC's sole reliance on this major purpose element to show that there is no conflict with the decisions of this Court and federal circuit

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> [N]arrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. *E.g.*, *Consolidated Edison Co.* [*v. Public Serv. Comm'n*], 447 U.S. [530,] 537-38 [(1980)] ("Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* [*v. Button*], 371 U.S. [415,] 438 [(1963)] (citations omitted).

Riley, 487 U.S. at 801. *See also In re Primus*, 436 U.S. 412, 432-33 (1978) (cautioning that "First Amendment freedoms need breathing space to survive, [and] government may regulate in [this] area only with narrow specificity"); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993); *United States v. Robel*, 389 U.S. 258, 266 (1967).

courts fails to demonstrate the lack of conflict and reveals that the decision below was wrongly decided. Opposition 17.

That there is a less restrictive, pre-approved means of advancing the compelling interests in disclosure that APOC and the Ninth Circuit assert concerning electioneering communications is obvious with a glance at the federal model. Petition 23-24. AKRTL does not object to the one-time disclosure that federal law imposes for *MCFL*-corporations making "electioneering communications" or "independent expenditures" because such reports are narrowly tailored to recognized compelling interests, unlike the burdensome level of compliance and disclosure imposed by Alaska's PAC-style restrictions.

Conclusion

This case involves matters of great public importance, and the decisions below conflict with decisions of this and other federal courts, so this Court should grant certiorari.

Respectfully submitted,

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